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SUPREME COURT, U.S.

No. 149

In the Supreme Court of the United States

OCTOBER TERM, 1968

RUSSELL G. COUNTRYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 149

RUSSELL G. COURTNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 390 F. 2d 521.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1968. A petition for rehearing was denied on May 1, 1968. On June 3, 1968, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 7, 1968, and on June 1, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether reversal of petitioner's conviction for obstruction of justice was required because the court of appeals found prejudicial error affecting petitioner's conviction on other counts under the Mann Act.

2. Whether, in light of trial testimony of the codefendant substantially the same as his extrajudicial statements, it was reversible error to admit these statements containing references to petitioner where petitioner chose to be jointly represented with his codefendant and did not claim in the trial court that he was prejudiced by the statements.

3. Whether the trial court abused its discretion in denying a motion for a continuance and in its rulings concerning petitioner's physical condition.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California of transporting and causing the travel of one Loretta Hoskins in interstate commerce for purposes of prostitution. He was also convicted of corruptly endeavoring to influence Loretta Hoskins in connection with her testimony as a witness before a federal grand jury, in violation of 18 U.S.C. 1503. On appeal the court of appeals reversed the conviction on the prostitution counts, mainly on the ground that government counsel had committed plain error in commenting on the failure of petitioner to call his wife as a witness. It affirmed the conviction for obstruction of justice on which petitioner received a sentence of four years' imprisonment.

1. The government's evidence showd that in April 1964 petitioner persuaded Loretta Hoskins, a nightclub waitress, to become a prostitute (4 R. 341–346, 474–475). She testified that she was given instructions by Beverly Caputo and thereafter, sometimes with Mrs. Caputo, traveled interstate at petitioner's direction, for the purposes of engaging in prostitution (4 R. 350–376; 5 R. 407–413, 427–433). On June 13, 1964, Mrs. Hoskins went to the police and told them of her activities (4 R. 434–435). Petitioner was then arrested (4 R. 435).

Mrs. Hoskins appeared before the federal grand jury on July 29, 1964, and was subpoenaed to appear again on September 30, 1964 (5 R. 437–439). In August 1964, she arranged to see codefendant Barry Kornhaber, the manager of the nightclub for which she previously had worked (5 R. 441). Kornhaber told her that petitioner wanted to talk to her because he was afraid that she would testify against him. Kornhaber said that if she would not testify, petitioner would give her cash and a trip to Hawaii and would return furniture belonging to her (5 R. 445–446). Later, petitioner met with Mrs. Hoskins and repeated the offer (5 R. 452–453). When Mrs. Hoskins mentioned that she had testified before the grand jury about his activities, petitioner threatened to notify her family about her activities (5 R. 453–456). At a second meeting with petitioner and Kornhaber, the promises and threats were repeated (5 R. 461). Mrs. Hoskins was persuaded to sign a note dictated by petitioner which stated that he had nothing to do with

prostitution and that she had lied to the authorities (5 R. 462–463).[1]

2. At both the first and second trials of petitioner and his codefendant Kornhaber, the government introduced extrajudicial statements of Kornhaber implicating petitioner. The same lawyer represented both defendants at both trials. Prior to the second trial, the lawyer had stated: "I didn't see any conflict of interest, and I still don't, and I am willing to try the case for Mr. Kornhaber" (2 R. 15, 30). When extrajudicial statements were discussed in a conference at the beginning of the second trial, the trial court said that "it will be appropriate, of course, to instruct the jury that these are admitted against only Mr. Kornhaber. Is that correct?" The government agreed and petitioner's lawyer made no response (3 R. 66).

When these statements were introduced into evidence there was no objection or request for a limiting instruction or for deletions of any portion (6 R. 573–580, 583–605), even though there was a recess during which counsel could have informed the court of any objections he wished to make outside the presence of the jury (6 R. 603). Shortly thereafter, the government rested its case. Codefendant Kornhaber was called as the first defense witness (6 R. 613). The court in its instructions, to which there was no objection, stated that admissions made after a conspiracy has ended can be considered only against the declarant

[1] Kornhaber was acquitted on the obstruction of justice count in which he was charged as a codefendant with petitioner.

(11 R. 1283–1293, 1463). At no time did petitioner request a separate trial.

Kornhaber, at the trial, testified that he had arranged a meeting between petitioner and Mrs. Hoskins at the former's request. He said that petitioner had previously told him that Mrs. Hoskins would implicate herself if she got petitioner into trouble and that she had been falsely claiming petitioner had beat her up (6 R. 625–626). Mrs. Hoskins had told Kornhaber that she had been working as a prostitute in Las Vegas where she had "shacked up" with petitioner (6 R. 627–629, 669). Mrs. Hoskins agreed to the meeting although she was afraid of petitioner because he had beaten her several times (6 R. 630). At the meeting, when Kornhaber asked petitioner if the beatings had occurred, petitioner denied them and Mrs. Hoskins remained silent. When petitioner asked why she wanted "to get him into all this trouble", Mrs. Hoskins replied that petitioner did not love her. Petitioner asked her to "write something to the effect that what she said wasn't true" and that everything could be resolved in that way (6 R. 631–632).

At a subsequent meeting, petitioner asked "why do you want to do this to me, Lorrie?". Mrs. Hoskins replied that it was too late because she had already obligated herself. Petitioner responded that if Mrs. Hoskins would write a note as to what had happened she would not get into any trouble. Petitioner purchased a pad of paper, and a note was written stating that whatever Mrs. Hoskins had formerly said was not

true. Kornhaber did not, however, recall who wrote the note (6 R. 640). Kornhaber stated that thereafter he gave Mrs. Hoskins a $400 loan which she previously had requested (6 R. 641). Kornhaber testified that he knew at the meetings that Mrs. Hoskins was going to testify against petitioner in a proceeding involving prostitution (6 R. 642, 680–681).

Kornhaber further testified that after he gave a statement to the F.B.I., he again got in touch with the F.B.I. because he felt that he was "sort of being taken advantage of" by the transactions with petitioner and Mrs. Hoskins. At a subsequent interview he told the F.B.I. that his original denial of knowledge of Mrs. Hoskins' note was false (6 R. 645).

ARGUMENT

1. The first trial of petitioner and Kornhaber ended in a hung jury. At that trial, Beverly Caputo, who was called as a government witness, denied that she had ever been a prostitute and claimed that she had traveled to Las Vegas with Mrs. Hoskins in May 1964 to seek employment as a show girl. About three weeks before the second trial commenced, petitioner married Mrs. Caputo (10 R. 1153) and neither side called her as a witness at that trial. In response to a government question, however, a witness testified that petitioner told her that he had married Mrs. Caputo to keep her from testifying against him (9 R. 1124). In closing argument, the government commented on the failure of petitioner to call his wife. This was the major basis for reversal of the Mann Act counts. The court of appeals also held that it was error to cross-examine

petitioner about his failure to file a 1964 income tax return and to admit testimony concerning a payment by a police officer to Mrs. Caputo for prostitution in July 1964.

The court below properly ruled that none of these errors infected the count for obstruction of justice. These errors related only to the prostitution counts. Beverly Caputo was identified as a significant witness with respect to both the prostitution activities and the interstate transportation of Mrs. Hoskins, having been in the same vehicle with her on two of the trips. There was, however, no suggestion in the evidence or in argument that she was a potential witness on the obstruction counts.

The other errors found by the court of appeals also pertained solely to the Mann Act charges. Testimony that a police officer paid money to Mrs. Caputo in July 1964 for prostitution was clearly unconnected with the obstruction count. As for the cross-examination of petitioner concerning his 1964 income tax return, the trial court immediately cautioned the jury to consider this fact as bearing only on petitioner's testimony as to the sources of his income (9 R. 1016–1017). Such source of his income was relevant only to the Mann Act counts. There was thus no reason to reverse the conviction for obstruction of justice merely because error was found as to the Mann Act counts.[2]

[2] The record shows that the other six alleged errors which the court of appeals did not discuss, all involving matters in the summation of the prosecutor to which petitioner did not object, did not constitute error affecting petitioner's rights on the obstruction count. For example, when the prosecutor asked

2. The introduction of the extrajudicial statements of Kornhaber does not require reversal of petitioner's conviction under *Bruton* v. *United States*, No. 705, October Term, 1967, decided May 20, 1968. As the court of appeals pointed out, the extra-judicial statements were substantially the same as Kornhaber's trial testimony and, indeed, were consistent with petitioner's defense.[3] Experienced counsel saw no conflict of interest between petitioner and Kornhaber, even after a prior trial had revealed the full nature of the statements. The decision to be represented jointly by one lawyer with his codefendant necessarily meant

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the jury in closing argument not to take the word of a "convicted pimp" (11 R. 1322, 1337, 1416), he was properly making use of petitioner's prior felony conviction for impeachment purposes. Likewise, when the prosecutor argued that individuals involved in prostitution would seldom volunteer their testimony, he was not suggesting that the government had other evidence which it did not present at the trial (11 R. 1418–1420, 1432).

[3] In the extrajudicial statements Kornhaber related that petitioner had feared that Mrs. Hoskins would falsely accuse him of beating her (6 R. 595–596), and that Mrs. Hoskins had worked as a prostitute (6 R. 576). In an initial statement, Kornhaber had said he knew of no discussion about a note (6 R. 598). He later said that a note was signed by Mrs. Hoskins but he was not sure who had prepared it (6 R. 579, 604–605, 607–608). According to one agent, Kornhaber, in mentioning Mrs. Hoskins' testimony in the statements, understood that there was both a local case and a federal case (6 R. 597–599).

In his own defense, petitioner said that he and Mrs. Hoskins collectively composed the note and that he did not threaten her to induce her to sign it (8 R. 918–919). He also related that Mrs. Hoskins had accused him of beating her (8 R. 917). Another defense witness testified that the note was collectively composed because Mrs. Hoskins "didn't know how to word it" (9 R. 1092). She and other witnesses both said that Mrs. Hoskins had not been threatened (8 R. 930–932; 9 R. 1091–1093).

that petitioner, in the interest of a common defense, did not want to cross-examine Kornhaber. Counsel's failure to seek limiting instructions as to Kornhaber's statements (see Statement, *supra*, p. 4) may also have reflected the fact that the Kornhaber statement was consistent with the testimony he was about to give and with petitioner's defense.

In this Court, petitioner attempts to show that the extra-judicial denial statements of Kornhaber were more damaging than Kornhaber's testimony (Pet. 24–25). The record does not support these claims. Kornhaber testified at the trial that Mrs. Hoskins told him she had worked as a prostitute for petitioner and that he had beaten her (6 R. 627–630). Kornhaber testified at the trial that he did not remember who wrote the note (6 R. 640); in his statements he said he was not sure who prepared it (6 R. 604–608).[4] As for the statement to the agent that Kornhaber thought petitioner was making a dupe of him (Pet. 25), Kornhaber testified that he got in touch with the F.B.I. agent before making his final statement because he felt he was "sort of being taken advantage of" (6 R. 645). In short, nothing in the record tends to negate the judgment of trial counsel that there was no conflict of interest between Kornhaber and petitioner and that they could properly be tried together even though it was known that Kornhaber had made statements to the F.B.I.

3. On September 10, 1965, shortly before petitioner's second trial commenced, he asked for a continuance

[4] As noted, *supra*, n. 3, a defense witness testified that the note was collectively prepared (9 R. 1092).

because of a herniated disc in his back (2 R. 27). At a hearing, a government physician and a partner of petitioner's attending physician both testified that petitioner could attend court if he took sedatives and that he could take medication which would not affect his understanding of the proceedings (2 R. 46, 62, 66–67). A third physician testified that the particular drug that petitioner was then using could affect his thinking process, depending on the individual reaction and the amount of the drug used (2 R. 74, 81). Dr. Gentile, the attending physician, was unavailable (2 R. 36), but his partner, who testified, had examined petitioner (2 R. 62). The court denied a continuance (2 R. 87–88).

On Wednesday, September 15, the day set for trial, the court conducted an inquiry into the medication that petitioner was then taking (3 R. 4–13). A physician appointed to examine petitioner (3 R. 4–13) found that petitioner was capable of understanding the proceedings and that the drug at the dosage he was taking would have no adverse effect on his mental processes. He also found that petitioner was in moderate pain and that his speech was slightly slurred (3 R. 21–29). The court, noting that petitioner had used a larger dosage of the drugs than had been prescribed, revoked petitioner's bail and ordered him placed in hospital custody during the trial so that there would be clear evidence of how much medication he was taking. The court also continued the case until the following day (3 R. 32–39).

The county hospital would not accept petitioner as a patient and he was taken to the hospital section of

the county jail where he received substitutes for the drugs that he had been taking (3 R. 89). When the court was informed of this fact, it established a procedure whereby petitioner could receive any medication that his doctor prescribed. The court agreed that petitioner could be placed in a private hospital if it would admit him (3 R. 97–101). The prosecutor then revealed that Dr. Gentile had informed him in a telephone conversation that the medication would not affect petitioner's ability to comprehend the proceedings (3 R. 167–168). The trial then commenced with the impaneling of the jury, the opening statements and the testimony of the first witness (3 R. 187 *ff.*). On the following day, petitioner was placed in a private hospital still under official custody (4 R. 241). Petitioner at that time disclosed that he had replaced Dr. Gentile as his physician (4 R. 239).

The court did not abuse its discretion in its ruling in connection with petitioner's medical problems. The fact that Dr. Gentile was unavailable did not preclude the court from acting on the basis of the testimony of three physicians, including a partner of Dr. Gentile who had examined petitioner. Significantly, petitioner did not dispute the statement that Dr. Gentile had told the prosecutor that the medication would not affect petitioner's ability to comprehend the proceedings. The court had discretion to revoke bail during trial and order petitioner placed in a hospital to eliminate any question as to the amounts of medication that petitioner was receiving. There is no indication that petitioner's defense at the trial was hindered by this action.

Nor did the court err in refusing to instruct the jury that petitioner had been given sedatives—an instruction sought because defense counsel thought petitioner was having difficulty speaking when petitioner testified in his own behalf (7 R. 795–798).[5] The court itself did not discern any lack of clarity in petitioner's speech. There was thus no basis for it to conclude that the jury would have noted some speech impairment and would have found petitioner's credibility impaired for that reason.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JULY 1968.

[5] Initially, when counsel made this request, the court asked him to prepare an instruction. Later, counsel said he did not prepare such an instruction because he was busy with other matters (7 R. 795–796).

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IN THE SUPREME COURT OF THE UNITES STATES

October Term, 1968

RUSSELL G. COURTNEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 149

PETITION FOR REHEARING

I was denied certiorari by this Court. I am asking for a rehearing on my appeal.

The decision handed down by the Ninth Circuit Court of Appeals was unjust and I ask you to review that decision. They, the Ninth Circuit, have decided that five-sixths of my trial was unfair and one-sixth was fair. I have asked six different attorneys to read the decision handed down by the Ninth Circuit Court of Appeals, and they all say the same thing, the decision was unjust and very bad.

I know that the United States Supreme Court has a lot of important decisions to make and tossing aside a case of one black man will not hurt anyone but the black man and his family and friends, but I have been subjected to black man justice all my life and I really felt that the time had come at least in our higher courts that the black as well as anyone else would at

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least get a fair hearing in this country. Well, I did not get a fair trial, was handed a compromise decision by the Ninth Circuit Court and completely shut out by your Court. If you would have truly reviewed my appeal, I am sure that it would be obvious that I did not get a fair trial. I have been fighting this injustice perpetrated on me since 1964. It has cost me and my parents a great deal of money, I have a permanent injury to my spine dealt out by jailers in the King County Jail in Seattle, Washington, something that happened because I was being held in jail illegally when I was supposed to have been released on an order from Justice William Douglas two weeks before I was released. I have had to report to the U.S. Marshal every day but Sunday for a year and a half since my release and then once a week till now. I had to go all the way to the Supreme Court to get a reasonable bail and now because of this Court's denial to hear my case, I have to go to prison for Obstructing Justice while a white man who stood trial with me was found innocent while I was found guilty on exactly the same evidence. If there is such a thing as justice for all in this country, then this Court will review my case.

I asked my attorney to allow me to write this plea to you. He has written and sent in the law pertaining to my case. I am not citing any law, but I know that the law that is sending me to prison is the law for the black man because a layman could read my case and know it was unfair and an unfair trial is supppsed to be unconstitutional in this country. I beg of you to review my case to right this injustice that I have suffered.

Very truly and sincerely,

Dated: October 28, 1968

/s/ Russell G. Courtney
Russell G. Courtney

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KENNETH FOLEY

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October 30, 1968

F. Conger Fawcett, Esq.
310 Sansome Street
San Francisco, California

Dear Conger:

I was shocked and surprised to learn that the U. S. Supreme Court did not grant a hearing in the Courtney case. If I have ever read a case that deserves to be reviewed, this case was it.

As you know, I have been close to this case from its inception. I have read the entire trial transcript, all of your briefs, the government briefs, and your Petition to the Supreme Court. This material leads one, inescapably, to the conclusion that Courtney did not receive a fair trial. The circuit court recognized this in their opinion. In view of all of the inflammatory testimony that this jury heard, and in view of the flagrant misconduct of the prosecutor, I fail to understand how any count can be affirmed. It makes no sense to me at all.

I am sure that you are going to file for re-hearing, but as you and I both know it is probably a lost cause at this point. It sort of shakes one's faith in the U.S. Supreme Court, but I know you will keep trying and maybe, somehow, justice will prevail.

If I can be of any assistance, please do not hesitate to call on me. I feel very strongly about this case, and will do anything I can to see this obvious injustice corrected.

Very truly yours,

Ken

KF:M

Kenneth Foley

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Nov. 1, 1968

Mr. F. Conger Fawcett
Graham & James
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San Francisco, California 94104

Dear Mr. Fawcett:

As you know, I am familiar with the trial and appeals in the case of the United States vs. Russell G. Courtney, and have read and studied in detail the transcript of the trial and all the briefs and opinions on appeal. I was relieved to hear that the Court of Appeals reversed the four counts alleging violation of the Mann Act, but I am at a loss to understand why the conviction of the fifth count for obstructing justice was allowed to stand.

I have just heard that Courtney's Petition for Certiorari to the U. S. Supreme Court was denied. I had - somehow, in spite of the known limited scope of such a petition - hoped that this last effort on appeal would result in definitely and forcefully putting the stamp of disapproval on the trial in this case, of which nobody could be proud.

It has been my opinion, and still is, that there were many grave trial errors in this case, and that these errors could not have but tainted the entire trial and the convictions of each and all of the counts charged. How a defendant can be prejudiced as to some of the counts only, by an apparently deliberate effort to make him out as a generally "bad man" and therefore guilty of all and everything, is hard to understand and impossible to swallow without a painful gulp. But this is the requirement of the final result in this case. To my mind it smatters of inherent, subtle, but perfectly apparent prejudice against this dark hued citizen in this most inflamatory case.

The serious and prejudicial errors at the trial were bad enough, but the trial attitudes of the prosecutor and the judge to me were shocking. And why Courtney's counsel was allowed, and even encouraged, to take on the defense of Courtney's alleged confederate in the obstruction of justice count, when their defenses were so antagonistic, does not comport with my idea of justice or the law. I think not only that the prosecution was in effect persecution but that the prosecution conduct throughout the trial stained the robes of justice in our Federal

Courts. As I read the record, even the judge was anything but an unbiased presiding officer and certainly did not give or assure this defendant the absolutely fair trial to which he was constitutionally entitled. I care not whether he was guilty or innocent, but I do care whether he received a fair trial and I am definitely of the unqualified opinion that he did not. Now, the appeals being exhausted, this defendant must swallow with a cynical smile what should never be allowed in this constitutional land of ours.

But I want to mention another thing that appears to have tainted this trial. It is the representation that this defendant received - or didn't receive - from his own counsel, which I have felt from the first in no wise effective. As indicated, Courtney's counsel was allowed to represent his co-defendant who definitely had an antagonistic defense. This should not have been permitted at the inception of the trial and also inquiries should then have been made to determine the facts on the point, especially as the antagonistic defenses must have been known - and later were shown to have been known to the prosecutor and to the FBI investigators. I believe the Supreme Court case of Ashe vs. McNamara (1st Cir. 1965) 255F 2d 277, is very much illustrative of what I have in mind. To me the record reflects a reluctance of Courtney's defense counsel to vigorously and fully defend him to the full amount of his ability. I think that the record shows that he was frightened or felt intimidated before the court and judge. I know not why. But I understand that he was himself in serious trouble with the Federal Courts and had just previously been indicted and tried for serious federal offenses and was at the very time of the Courtney trial either under federal investigation for serious federal offenses or had already been indicted by the Federal Grand Jury. At any rate, I am told that shortly after Courtney's trial his counsel was in fact tried and convicted of a number of federal offenses. This situation is a possible explanation of why he did not give this defendant the effective assistance of counsel to which he was constitutionally entitled. It seems to me that some point should be made of this. Also I question the propriety of an attorney in serious federal trouble with the Federal Government and on the brink of trial for federal offenses to elect to undertake the defense of another person before the Federal Courts, who is himself charged with serious federal offenses. To me this situation adds not-to-be-ignored weight to the possibility that this counsel did not give and this defendant did not get effective assistance of counsel

Nov. 1, 1968

throughout the trial.

I could write you much more as to why I feel so strongly that this is an unfair trial that the Federal Government got away with. But what I have said will illustrate, and that must suffice.

I have got it off my chest. What more can I say?

Cordially,

C. Arden Gingery

C. ARDEN GINGERY

CAG:b

CERTIFICATE OF SERVICE

I, F. Conger Fawcett, being a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that I have, this 5th day of November, 1968, served a copy of the foregoing Petition for Rehearing upon the following persons, counsel for the respondent United States, by mailing such copies first class air mail, postage prepaid as fdllows:

The Hon. Erwin N. Griswold
Solicitor General of the United States
U.S. Department of Justice
Washington, D.C. 20530

and

Wm. Matthew Byrne, Jr., Esq.
United States Attorney
Robert L. Brosio, Esq.
Assistant U.S. Attorney
600 United States Court House
312 North Spring Street
Los Angeles, California 90012

Dated at San Francisco, California, this 5th day of November, 1968.

/s/ F. Conger Fawcett
F. Conger Fawcett

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